No. 120, Original (12)

IN THE

Supreme Court of the United States

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

EXCEPTIONS OF THE STATE OF NEW YORK TO THE REPORT OF THE SPECIAL MASTER

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QUESTIONS PRESENTED

1. Whether the Special Master erred in recommending that this Court declare that the State of New Jersey is sovereign over the landfilled portions of Ellis Island added after 1834, where the 1834 Compact between the States of New York and New Jersey provided that New York "retain its present jurisdiction of and over" Ellis Island without qualification, use of landfill to reclaim subaqueous land adjacent to fast land was widespread in New York Harbor at the time of the Compact, and a central purpose of the Compact was to confirm New York's control of commerce and navigation in New York Harbor.

2. Whether the Special Master erred in concluding that New York was not entitled by virtue of the doctrine of prescription and acquiescence to defeat New Jersey's claim of sovereignty over the landfilled portions of Ellis Island, where (a) New York presented extensive undisputed evidence of its prescriptive exercise of dominion over the landfilled portions of Ellis Island throughout the period during which Ellis Island served as a United States immigration station, and (b) New Jersey's evidence of its nonacquiescence in New York's exercise of dominion during this period is sparse, ambiguous and obscure.

3. Whether the doctrine of laches should apply to cases involving the enforcement of interstate compacts.

4. Whether, if laches applies to the present case, the Special Master erred in concluding that New Jersey's decades-long delay in commencing the present action did not give rise to laches by prejudicing New York's ability to offer a defense, where the delay rendered unavailable to New York both documentary evidence and testimony that, if available, might have resolved the issues raised by the case.

PARTIES

The parties to the action are listed in the caption.

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No. 120, Original

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October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

EXCEPTIONS OF THE STATE OF NEW YORK TO THE REPORT OF THE SPECIAL MASTER

The defendant State of New York excepts to the Final Report of the Special Master, dated March 31, 1997, and to the Supplement thereto, dated May 30, 1997, recommending that New Jersey be declared sovereign over the landfilled portions of Ellis Island.

JURISDICTION

The original jurisdiction of the Court is invoked under Article III, section 2 of the Constitution of the United States and under 28 U.S.C. § 1251(a) (1993).

STATUTE INVOLVED

The Compact between the State of New York and the State of New Jersey, enacted by Congress on June 28, 1834, 4 Stat. 708 (1834), appears as the Appendix to this brief.

STATEMENT OF THE CASE

At issue in this case is sovereignty over less than four one-hundredths of a square mile of artificial land -- the landfilled portions of Ellis Island, a 27.5-acre island lying west of the mid-point between New York and New Jersey in New York Bay.

In 1664, King Charles II of England granted to his brother, the Duke of York, the territory comprising the former New Netherland, including all of what is now New York and New Jersey and the waters between them (NY 866 pp 18-19).[1] That same year, the Duke of York conveyed to John Lord Berkeley and Sir George Carteret "all that tract of land adjacent to New England, and lying and being to the westward of Long Island, and Manhitas [i.e., Manhattan] Island, and bounded on the east part by the main sea, and part by Hudson's river" (NY 966 p 19). In 1691, the Colonial Assembly divided New York into twelve counties, including "The City and County of New York, to contain all the Islands commonly called Manhattan's Island, Manning's Island, the two Barn Islands and the three Oyster Islands; Manhattan's Island to be called the City of New York, and the rest of the Islands, the County" (NY 966 pp 32-33). Governor John Montgomerie's 1730 Charter to New York City identified the boundary of the South Ward of the City as running "across the North [i.e., Hudson] river so as to include Nutten Island Bedlows Island Bucking Island and the Oyster Island to low-water mark on the west side of the North river and so to run up along the west side of the said River at low water marke" (NY 743 p 281).

Sometime during the late 1700s, one Samuel Ellis obtained an island that had been one of "the three Oyster Islands" in 1691 and "Bucking Island" in 1730 (NY 938 p 19). The Island became known as Ellis Island, and remained part of New York City after the American Revolution (NY 938 p 20). In 1794, New York City granted to New York State "the Soil from high to low Waters Mark around Ellis's Isle for the purpose of erecting

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[1]Parenthetical citations preceded by "NY" are to the numbered exhibits submitted by the State of New York, and those preceded by "NJ" are to the numbered exhibits submitted by the State of New Jersey. Parenthetical citations preceded by "T" are to the trial transcript, those preceded by "R" are to the Final Report of the Special Master, and those preceded by "S" are to the Supplement to the Final Report.

Fortifications for the Defence of this City" (NY 742). New York State, in turn, provided in 1800 that Ellis Island and nearby Bedloe's (subsequently Liberty) Island "shall hereafter be subject to the jurisdiction of the United States: Provided, that this cession shall not extend to prevent the execution of any process, civil or criminal, issuing under the authority of this State" (NY 83). In 1808, New York State, having obtained title to Ellis Island, conveyed its right, title and interest to the United States (NY 92). The conveyance was made "on the express condition of [the Island's] reverting to the people of [New York] in case [it was] not applied to the purposes" of "providing for the defence and safety" of the Port and City of New York (NY 85, 92). Thereafter, the United States constructed a fortification known as Fort Gibson on the Island (NY 938 p 26).

In the early 1800s, New Jersey took the position that the boundary line between New York and New Jersey lay at the mid-point of the waters between the two states (NJ 266). In New York's view, the River and Bay in their entirety were part of New York by virtue of the colonial grants (NJ 265). Commissioners from the two states attempted to settle the dispute, without success, in 1807 and 1827 (NJ 260, 280). New Jersey then filed a suit in this Court in 1829, seeking establishment of New Jersey's "rights of property, jurisdiction and sovereignty west of the mid-point of the waters of the Hudson River and New York Bay" (NJ 293). In its complaint, New Jersey conceded that, while the states were colonies, New York had taken possession of the islands "in the dividing waters between the two States," and "that the possession thus acquired by New York, ha[d] been since that time acquiesced in" by New Jersey (NJ 293). The Court issued an opinion and order asserting its jurisdiction over the case in 1831. *New Jersey v. New York*, 30 U.S. (5 Pet.) 284 (1831).

In 1833, Commissioners appointed by New York and New Jersey produced a Compact that was adopted by the Legislatures of both states (NJ 307-313) and enacted by Congress as a statute in 1834 (NJ 322). Article First of the Compact provided that "[t]he boundary line between the two states . . . shall be the middle of the [Hudson] river [and] of the Bay of New York." Under Article Third, New York received "exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of the Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof," subject to certain "rights of property and of

jurisdiction of the state of New Jersey," including New Jersey's "exclusive right to property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan and New Jersey." Article Second of the Compact provided that "the state of New York shall retain its present jurisdiction of and over Bedlow's [sic] and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state."

At the time of the Compact, Ellis Island's area was between 3 and 3¾ acres at high water, and between 4½ and 6½ acres at low water (T 2952). The United States Army remained in Fort Gibson on Ellis Island until 1861, when the fort was dismantled and a naval powder magazine established (NY 74 p 3). In 1891, Congress brought immigration under federal control.[2] The federal government selected Ellis Island as the immigration station for the Port of New York and set about expanding the Island by means of artificial landfill. When Ellis Island opened as an immigration station on January 1, 1892, its area was approximately 11 acres (R App F).

On June 15, 1897, the Ellis Island immigration station was entirely destroyed in a fire (NY 74 p 215). Congress immediately appropriated funds to rebuild "Ellis Island, New York," and gave authorization to enlarge Ellis Island beyond its then 14-acre size. 30 Stat. 113 (1897). This enlargement took the form of an extension of some three acres of filled land, on which was built a hospital, operated by the United States Marine Hospital Service, the predecessor of the Public Health Service (NY 74 pp 576, 1212, 1223-24). The new landfill and the preexisting land parallel to it were connected at one end by underwater fill and by a ferry house built on pilings embedded in the fill (T 2233, 2972). The entirety of Ellis Island now formed a "U" shape, with the ferry house at the bottom of the U, the parallel rectangles of the pre-1897 Island and the new extension as the arms of the U, the waters

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[2]Authority over immigration was first placed in the Bureau of Immigration within the Department of the Treasury, 26 Stat. 1084 (1891), then transferred to the Department of Commerce and Labor in 1903, to the newly-created Department of Commerce in 1913, and to the Justice Department in 1940 (NY 74 pp 53, 489, 892). What is now the Immigration and Naturalization Service has existed under various names and in various administrative configurations (T 1345-46), all of which are referred to in this brief as INS.

of the "ferry basin" inside the U, and the open waters of New York Bay at its top. The new Ellis Island immigration station opened in late 1900; the hospital opened in 1902 (NY 952 pp 104, 503). The new landfill containing the hospital was commonly referred to as "Island No. 2" (NY 626).

Soon after the hospital opened, the authorities on Ellis Island recognized the need for a separate "contagious disease hospital" to be located some distance from the main hospital (NJ 345). In 1903 Congress appropriated funds for this hospital, which was built on a new four-acre strip of landfill parallel to the existing Island (NJ 355). 32 Stat. 1084 (1903). When the contagious disease hospital opened in 1911, the landfill it occupied was connected to the existing Island by a plank gangway constructed on piles (NY 74 p 608; NY 952 p 507). This landfill became known as Island No. 3 (NY 662).

Between 1900 and 1921, nearly 16 million immigrants arrived in the United States at Ellis Island (NY 952 p 6). In the 1920s, changes in the immigration law, including quotas for immigrants and the provision for inspection and qualification of immigrants in their countries of origin, *see* 43 Stat. 153 (1924), 42 Stat. 5 (1921), altered the role of Ellis Island in American immigration. After 1924, Ellis Island functioned principally as a center for the assembly, detention and deportation of aliens who had entered the United States illegally or had violated the terms of their admission (R App F). Ellis Island itself continued to grow, as the subaqueous land between the two hospital extensions was filled during the 1920's, and additional landfill was placed on the northern side of the Island in the 1930's (NY 74 p 1358). But Ellis Island's role as an immigration station declined. During World War II, the United States Coast Guard occupied Ellis Island (T 2436). The Island closed as an immigration station at the end of 1954 (NJ 108).

After the immigration station closed, Ellis Island was transferred to the federal General Services Administration (GSA), which in 1955 declared it to be surplus public property (NJ 393). GSA made unsuccessful attempts to sell the Island to private interests (NY 74 pp 1147-1151). In 1960, the United States Senate Subcommittee on Intergovernmental Relations of the Committee on Government Operations conducted hearings about Ellis Island (NJ 143), and on May 11, 1965, a Presidential Proclamation made Ellis Island part of the Statue of Liberty National Monument (NJ 163). The National Park Service (NPS) assumed control over Ellis Island shortly

thereafter (NY 78). Over the next decade, as Congress failed to appropriate funds for Ellis Island, conditions on the Island deteriorated greatly due to vandalism and neglect (NJ 162, 163, 166). In 1976, Congress appropriated funds for Ellis Island rehabilitation, permitting restoration of the Island and its assumption of its present place in the national system of historic sites and monuments (NJ 394).

The restoration and reopening of Ellis Island began to produce tax revenues. In 1984, individual New Jersey taxpayers filed a lawsuit in New Jersey state court, naming both New Jersey and New York as defendants and contending that New York, unlike New Jersey, was levying sales tax on transactions occurring on Ellis Island and state income tax on businesses and persons working on the Island, thus allegedly violating the terms of the 1834 Compact (NY 950). New Jersey's answer acknowledged that only New York was exercising state taxing authority on Ellis Island (NY 951). In 1986, the Governors of New York and New Jersey executed a Memorandum of Understanding, taking note of the pending lawsuit[3] and seeking to avoid "such conflicts" by creating a fund for the homeless to be financed, *inter alia*, by tax revenues attributable to Ellis Island (NJ 180). New York has never enacted a law to give effect to this Memorandum.

In 1986, a federal employee injured while performing maintenance work on the filled portion of the Island commenced an action in the Southern District of New York against the manufacturer of the machine he was using when he was injured. The manufacturer impleaded the United States. The viability of such a third-party action was governed by the applicable state law. New York law permitted such an action; New Jersey law did not.

The case reached the United States Court of Appeals for the Second Circuit, with both New York and New Jersey filing *amicus* briefs. The Second Circuit determined to apply New York law, relying principally on Article Second of the Compact, "which clearly provides that '[t]he State of New York shall retain its present jurisdiction of and over . . . Ellis' island [ ].'" *Collins v. Promark Products, Inc.*, 956 F.2d 383, 386 (2d Cir. 1992) (brackets and ellipsis in decision). While the United States "contend[ed] that

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[3]The case was eventually dismissed. *See Guarini v. New York*, 521 A.2d 1362 (N.J. Super. Ct. Ch. Div.), *aff'd*, 521 A.2d 1294 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 484 U.S. 817 (1987).

'present jurisdiction' refers to the 3-acre version of Ellis Island as it stood in 1833 and not to the 27.5-acre version as it stands today," the court concluded that "[t]he language of the Compact concerns power over the *entity* known as Ellis Island and in no way implicates the size of the entity." *Id.* According to the court, "Ellis Island in its entirety is subject only to the jurisdiction of New York, under a specific provision of the Compact designed to preserve the *status quo ante* of New York jurisdiction." *Id.* at 387. The Compact, in the court's view, recognized New York's exercise of jurisdiction over Ellis Island "[f]or more than three centuries," with "[t]he 'present jurisdiction' language only acknowledg[ing] that government ownership carried with it some limited form of federal jurisdiction." *Id.*

In the wake of the Second Circuit's *Collins* decision, New Jersey, invoking the original jurisdiction of this Court, sought leave to file a complaint seeking, *inter alia*, a declaration that "the original natural" Ellis Island is "within the territory and jurisdiction of the State of New York," while "the balance of the island" is "within the territory and jurisdiction of the State of New Jersey" (Complaint p 15). On May 16, 1994, this Court granted New Jersey leave to file the complaint. *New Jersey v. New York*, 511 U.S. 1080 (1994). New York answered, contending that it had jurisdiction over all of Ellis Island by virtue of both the Compact's grant of "present jurisdiction" over the Island and its award to New York of "exclusive jurisdiction" over the waters of New York Bay and "the lands covered by" those waters (Answer). New York further contended that its long-time unopposed and unconcealed exercise of sovereignty and jurisdiction over Ellis Island meant that, "[b]y principles of prescription and acquiescence," New York "currently has jurisdiction and sovereign authority over Ellis Island in its entirety" (Answer). New York subsequently sought to amend its answer to raise the defense of laches (R 27).

The matter was referred to Paul Verkuil, Esq. as Special Master on October 11, 1994. 513 U.S. 924 (1994). On May 9, 1996, the Special Master denied both states' motions for summary judgment, and trial followed. On March 31, 1997, the Special Master issued his Final Report, concluding, *inter alia*, that "[t]he sovereign boundary of the States on Ellis Island lies at the division between New York's 'original' Island . . . and New Jersey's landfilled additions," that "[s]ince the Compact of 1834, New Jersey has exercised jurisdiction over her sovereign territory on Ellis Island, and [that] she has not acquiesced in New York's isolated acts of prescription over the landfilled portions of Ellis Island" (R 2).

The Special Master rejected New York's argument that it had jurisdiction over the filled portion of Ellis Island by virtue of the grant to New York, in Article Third of the 1834 Compact, of "exclusive jurisdiction of and over all the waters of the bay of New York . . . and of and over the lands covered by the said waters" (R 53-60, 63-80, 81-88). With respect to Article Second of the Compact, the Special Master rejected New Jersey's suggestion that New York's retention of its "present jurisdiction" over Ellis Island is a "geographical limitation on the size of Ellis Island in 1834," concluding that the term "refer[s] to the fact that Ellis Island was owned and operated by the United States at the time of the 1834 Compact" (R 62). The Special Master nonetheless concluded that Article Second does not give New York jurisdiction over the filled portions of Ellis Island. Rather, he said, the Compact "does not address the question of which State has sovereignty over *an expanded Ellis Island*" (R 62). The Special Master found the reasoning of the Second Circuit in *Collins* "unpersuasive" (R 81), rejected New York's suggestion that "the Compact accommodates th[e] possibility" of "territorial expansion of a small island" (R 92), and deemed "ambiguous" the evidence "that the practice of fill or wharfing-out had been established and thus taken for granted" at the time of the Compact (R 92 n 39).

Because the Special Master believed that "the Compact does not address expansion by landfill" (R 92), he turned to the common law of "avulsion," or sudden shifts and changes of land. Finding "that acts of avulsion do not expand territorial lines," the Special Master concluded that the avulsive change made by landfill to Ellis Island could not alter the boundary between the states, such that the filled portions of Ellis Island remained "within the sovereign territory of New Jersey" (R 97-99).

The Special Master then addressed the issue of prescription and acquiescence. He recited New York's acts of prescription, noting that "New Jersey does not contest" them (R 113). Believing, however, that "[t]he evidence of many of these acts is inconclusive with respect to the landfilled portion of the Island" (R 114), he found that New York "failed to prove that she exercised dominion and possession over the landfilled area of [Ellis] Island" (R 124), adding that, in any event, "New Jersey's evidence of non-acquiescence . . . is conclusive" (R 124).

The Special Master likewise rejected New York's contention that New Jersey was guilty of laches in asserting its claim to Ellis Island. In his

view, New York had not demonstrated prejudice to itself by New Jersey's delay in filing suit (R 103-105). The Special Master noted New York's position "that documents may have been destroyed prior to the time suit was commenced," but found it "impossible to know from the record whether that speculation is correct" (R 104-105). Thus, he could not "find prejudice on the facts before" him (R 105). In any event, he opined, "application of the laches doctrine is not necessary to a just resolution of this case" because "New York's concerns can be addressed through an analysis of prescription and acquiescence" (R 105).

Finally, having concluded that all of the landfilled portion of Ellis Island was subject to New Jersey's jurisdiction, the Special Master attempted to draw the sovereign boundary between the two states on Ellis Island. He recommended that New York be given the "original Island" to its mean low-water rather than its mean high-water mark (R 151-154) and ordered the parties "to appoint a surveyor to define in precise terms the boundary I have described" (R 155-162, 168). On May 30, 1997, the Special Master issued a Supplement to his Final Report. He chose as his "Designated Survey" a survey prepared by New Jersey with certain slight variations (S 11). This survey leaves New York with a territory of 5.1 acres, while New Jersey gets the remaining territory (S 8). On June 16, 1997, this Court issued an order accepting the Special Master's Report. 65 U.S.L.W. 3825.

SUMMARY OF ARGUMENT

New York's retention of its "present jurisdiction" over Ellis Island in the 1834 Compact with New Jersey entitles it to sovereignty over both the landfilled and "original" portions of the Island. The plain language of the Compact awards "Ellis Island" to New York with no limitation on the size of the Island. The use of landfill to reclaim subaqueous territory in New York Harbor was so commonplace at the time of the Compact that it required no specific mention in Article Second of the Compact to have been envisioned by the Compact's framers. Moreover, New York's retention of sovereignty over the islands in New York Harbor was critical to a central aim in creating the Compact: maintaining New York's control over commerce and navigation in the Harbor.

Even without the Compact, New York's long and continuous possession of Ellis Island and New Jersey's acquiescence therein entitle New

York to sovereignty over the entire Island under the doctrine of prescription and acquiescence. Throughout the "immigration period" of 1890-1954, and on both the filled and "original" portions of the Island, New York acted in the areas of voting, health, vital records, marriage, law enforcement and labor standards. New Jersey never did. All branches of the federal government regarded Ellis Island as in New York. There is no evidence that anyone who lived on, worked at or passed through Ellis Island during the immigration period believed that the Island was in New Jersey. The few episodes mentioned by New Jersey as evidence of its "counter-prescription" over the Island instead demonstrate, in their sparseness, brevity, and obscurity, that New Jersey acquiesced in New York's exercise of dominion.

The doctrine of laches also entitles New York to prevail. The policy considerations that prevent application of this doctrine to a sovereign do not pertain to interstate compact cases. Nor are the concerns vindicated by laches adequately addressed by the doctrine of prescription and acquiescence. Indeed, in an early interstate compact case, this Court recognized the applicability of both doctrines. In the present case, New Jersey's unexplained decades-long delay in commencing suit has deprived New York of probative documents and testimony addressing both its exercise of dominion over the Island and New Jersey's acquiescence in that exercise, and thus has prejudiced New York's case.

ARGUMENT

POINT I

UNDER ARTICLE SECOND OF THE COMPACT, NEW YORK HAS JURISDICTION OVER THE FILLED PORTION OF ELLIS ISLAND

The plain language of Article Second of the 1834 Compact indicates that Ellis Island, in its entirety, is under New York's jurisdiction. The "present jurisdiction" retained by New York over "Ellis Island" is sufficient to guarantee New York's sovereignty over both the "original" and filled portions of the Island as it exists today. This interpretation is supported by the widespread use of landfill to reclaim subaqueous land in New York Harbor at the time of the Compact and comports with a central purpose of the Compact, which was to resolve rights of property and jurisdiction while maintaining New York's control over commerce and navigation in New York Harbor.

The central question under the Compact is this: Why, given that (by New Jersey's own admission, *see* 1993 Complaint p 15) the Compact's award of "jurisdiction" over Ellis Island is sufficient to put whatever portion of Ellis Island is encompassed by Article Second "within the territory and jurisdiction of the State of New York,"[4] and that (as the Special Master recognized) the Compact itself contains no express geographical limitation on the "Ellis Island" that is under New York's control, should New York not be entitled to all of Ellis Island as it currently exists? The Second Circuit could find no reason. "Surely," that court said, "the Commissioners must have contemplated that the territory of the Island might over the years decrease or increase as the result of natural or artificial forces;" indeed, the "language of size forms no part of the structure of the Compact as it

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[4]The Special Master appears uncertain whether even the "original" Ellis Island is "in" New York, or whether New York instead has only "some degree of extra-territorial law-making and law-enforcing authority over the 1833 islands in New Jersey's territorial waters" (R60). New Jersey's concession that at least part of Ellis Island is in New York's "territory" resolves the question: whatever portion of Ellis Island is under New York's sovereignty is also "in" New York.

specifically relates to Ellis Island." *Collins*, 956 F.2d at 386-87. The simple facts are that the Compact "does provide for jurisdiction over Ellis Island," that it says nothing suggesting that New Jersey might have jurisdiction, and that instead "New York is the jurisdiction provided." *Id.* at 389.

The Special Master rejected this straightforward reading of the Compact, instead concluding that it "does not address the question of which State has sovereignty over an expanded Ellis Island" and for that reason resorting to the common law of avulsion (R 62). None of the reasons offered by the Special Master for rejecting this interpretation is persuasive.

The sole paragraph on this subject in the body of the Special Master's Report offers an improbable reading of Article Second and then rejects New York's interpretation by attributing the absurdity to New York. In the Special Master's view,

> New York's position raises the question of what the States would have contemplated in 1833 if Ellis Island were to grow to many times its "original" size. . . . Would no limits have been contemplated on the ultimate size of the Island over which New York had jurisdiction? . . . Under this interpretation of the Compact, . . . New York theoretically could add to her territory an area as large as Governors Island within New Jersey's sovereign territory. I am unpersuaded the Compact accommodates this possibility. If such territorial expansion of a small island were contemplated in 1833, some references to it would logically have been set forth in the 1834 Compact. Silence cannot bear such interpretative weight (R 92).

As this Court has noted, however, a statute (such as the 1834 Compact) is not to be interpreted "by envisioning extreme possible applications." *United States v. Sullivan*, 332 U.S. 689, 694 (1948). Obviously, far-fetched results can be imagined for the Special Master's reading of the Compact as well: for instance, it would appear to permit New Jersey to surround Ellis Island with landfill and thwart whatever uses New York might make of the Island. Compact interpretation, however, is not a matter of dueling absurdities. Although "Congressional consent elevates an interstate compact into a law of the United States, yet it remains a contract which is subject to normal rules of enforcement and construction."

Oklahoma v. New Mexico, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., concurring in part and dissenting in part). As a matter of federal common law, and in both New Jersey and New York, every contract contains an implied covenant of good faith and fair dealing between the parties. *See Kentucky v. Indiana*, 281 U.S. 700, 701 (1930) (decree of this Court requiring that Indiana perform in good faith the covenants of interstate agreement); *Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575, 587 (NJ 1997); *New York Univ. v. Continental Ins. Co.*, 662 N.E.2d 763, 769 (NY 1995). The suggestion that a literal reading of the Compact, unaided by either this implied covenant or common sense, would permit Ellis Island to become the land mass that swallowed New Jersey, does not address, let alone resolve, whether the "Ellis Island" referred to in Article Second encompasses the modest landfill added to the Island during the immigration period of 1890 through 1954.

The fact that extension of Ellis Island by landfill could have been foreseen by the Commissioners who devised the Compact is demonstrated by the widespread use of landfill to reclaim subaqueous land in New York Bay by both New York and New Jersey before and at the time of the Compact. The Special Master found evidence of this practice "too ambiguous to permit a factual finding that the practice of fill or wharfing-out had been established and thus taken for granted during that time" (R 92 n 39). In fact, the evidence is conclusive on this point.

Indeed, as the Special Master recognized, prior to 1833, Ellis Island itself had been expanded by means of landfill. An 1819 map shows a pier or dock on the southwest side of the Island (NJ 478 [G]). New York's expert testified that this pier was probably constructed to carry ammunition by rail to Fort Gibson, and thus needed to be sturdy, and that the pile-driving techniques necessary to enable pilings to support such weight were not in use at the time (T 2932, 3029). The Special Master professed himself "convinced by th[is] testimony" and concluded that "fill was added to Ellis Island before 1833" (R 158-159).

Moreover, as one expert put it, the history of New York City is a history of expansion by landfill (T 1617). The 1686 Dongan Charter granted to New York City the right to "fill and make up and lay out . . . the lands and grounds in and about the said City" to the low water mark (NY 743 pp 265-266). Between 1687 and 1695, the City of New York sold "water lots" of subaqueous land to private purchasers, who were required to construct a

street or wharf on the rear of their lots. J.W. Gerard, *A Treatise on the Title of the Corporation and Others to the Streets, Wharves, Piers, Parks, Ferries and Other Lands and Franchises in the City of New York* (1873) 208. Similarly, the Montgomerie Charter of 1730 gave City officials "the land beneath the Hudson River to four hundred feet from low water mark . . . with full power and authority . . . to fill make up wharf and lay out . . .[and] build upon and make use of in such manner as they . . . shall think fit" (NY 743 pp 324-325). Periodically thereafter during the 1700s and early 1800s, New York City received authority to fill more subaqueous land. Report of Harbor Commissioners Relative to Encroachments and Preservation of the Harbor of New York, 1856 Documents of the Assembly of the State of New York, Doc. No. 8, pp 30-35. "The New York City seaport . . . . was complete by 1835," and "[a]ll of it was built on landfill, the earth excavated from unwanted hills as the city leveled and regulated itself in the 1810s" (NY 916). By the 1830s, the original shores of Manhattan "were two or three blocks inland," while the outermost streets on the East and Hudson Rivers "were on 'made land,' far out beyond the low-water mark of earlier days." Robert G. Albion, *The Rise of New York Port* 221 (1939). By 1834, there were at least 750 acres of "made land" in Manhattan. Ann L. Buttenweiser, *Manhattan Water-Bound* 28-29 (1987).

Nor was the use of landfill confined to New York. In 1805, the owner of a tract of subaqueous land in New Jersey filed in the Bergen County Clerk's office a map of this land, including public streets, entitled "a plan of the new city of Hoboken." *City of Hoboken v. Pennsylvania R. Co.*, 124 U.S. 656, 659 (1888). For many years afterward, this land remained underwater. *Id.* at 660. But the fact that in 1805 a New Jersey landowner troubled to devise a street map for subaqueous land indicates the routine expectation that New Jersey tideland, like the land around Manhattan, could and would be reclaimed by landfill. Similarly, a case of New Jersey's highest court establishes that the Jersey Associates, proprietors of subaqueous land in Jersey City, had been "engaged, since 1804, in reclaiming the [Jersey] flats," such that by 1852 "nearly one half of all Jersey City [was] below the old high water mark." *Bell v. Gough*, 23 N.J.L. 624, 652 (N.J. 1852).

Thus, the evidence indicating that the "use of fill on islands in [New York] harbor and on the Manhattan or Jersey shores was already an accepted practice" is not, as the Special Master concluded, "ambiguous" (R 92 n 39); rather, it is overwhelming. Both New York and New Jersey

recognized and practiced the use of landfill as a means of reclaiming subaqueous territory. And the routine use of landfill for this purpose means that its employment for a modest expansion of Ellis Island would indeed have been taken for granted in 1833.

According to the Special Master, even a finding "that the practice of fill . . . had been established and thus taken for granted" by 1833 would not have "affect[ed his] analysis" (R 92 n 39). There are, he says, three reasons for this: "the scheme of the Compact, the absence of any allusions to such practices in the Compact, and this Court's application of the doctrines of accretion and avulsion in original jurisdiction cases" (R 92 n 39). None of these objections withstands scrutiny.

By "the scheme of the Compact," the Special Master evidently means that "the 'grand scheme' of the Compact was to declare territorial rights to the Bay of New York and most of the Hudson River, . . . not to speculate on the growth potential of the small islands in the Harbor" (R 93). But though the drafters of the Compact were of course concerned with more than just Ellis Island, the disposition of the Island in the Compact was part of one of the Commissioners' central aims: retention of New York's control over commerce and navigation in New York Harbor. During the unsuccessful 1827 negotiations between the states, New Jersey proposed to "yiel[d] to New York exclusive jurisdiction over the adjoining waters in several important matters, which the health and commercial welfare of the city of New-York seemed to require," deeming "these concessions to be justified" because "that great and rapidly increasing emporium of commerce is identified with our national prosperity" (NJ 274). Thus, said New Jersey, it offered New York "important rights in the waters of the Hudson, so as to ensure to the city of New-York the more effectual protection of her health and commerce" (NJ 276).

This was the context in which the Compact was eventually produced in 1833. It awarded New York "exclusive jurisdiction of and over all the waters of the bay of New York." The New York Commissioners who negotiated the Compact made clear the significance of this grant: "[T]he middle of the waters" between the states, they said,

> is to be the line of jurisdiction, except where circumstances render a departure from it proper. This was peculiarly the case with respect to the waters adjacent to the City of New

> York, and we trust that the jurisdiction necessary for the health, improvement, and police of that City has been amply secured (NJ 312).

Decisions of this Court and the highest courts of both states support the view that guaranteeing New York's control over commerce and navigation in New York Harbor was, along with establishing the territorial boundary between the states, the great object of the Compact. *See, e.g., Central R.R. Co. of New Jersey v. Mayor of Jersey City*, 209 U.S. 473, 479 (1908) ("the purpose [of Article Third grant of exclusive jurisdiction] was to promote the interests of commerce and navigation"); *Ferguson v. Ross*, 27 N.E. 954 (N.Y. 1891) (purpose of Article Third "was to promote the interests of commerce and navigation, which would, as supposed, be best subserved by giving to [New York] the exclusive control and regulation of the waters of the bay and harbor"); *State v. Babcock*, 30 N.J.L. 29, 31 (N.J. 1862) (Elmer, J., one of New Jersey's 1833 Commissioners) (New York "deemed it indispensable that their great commercial emporium should have the exclusive control of the police on the surrounding waters").

Without exception, New York's "indispensable" jurisdiction extended under the Compact to both the waters and the land -- that is, the islands -- in New York Bay.[5] In this manner, consistent regulation of the Harbor -- from its military and commercial traffic to its ferried passengers to its lighthouses and ship markings -- was assured. Although the framers of the Compact could have achieved this purpose by other means, they chose to do so by awarding New York sovereignty over the islands in the Harbor. As the Special Master sees it, however, the instant any landfill is added to any of the islands west of the mid-point of the Bay, New Jersey's entitlement to sovereignty over such newly-made land undermines New York's authority in the middle of the very waters over which New York's exclusive

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[5] Article Second of the Compact awarded New York, in addition to Bedloe's and Ellis Islands, "exclusive jurisdiction of and over the other islands lying in the [Bay] and now under the jurisdiction" of New York. The Compact contains no parallel provision for New Jersey, which in its 1829 Complaint in this Court conceded that New York had jurisdiction over "Staten Island [the largest island between the states in the Bay] and the other small islands in the dividing waters between the two States" (NJ 293)--in other words, over all the islands in the Bay.

jurisdiction is essential. This reading of the Compact is simply incompatible with a central aspect of the Compact's "grand scheme," which was to preserve New York's jurisdiction over New York Bay. If, as the Special Master concludes, New Jersey was sovereign over everything west of the mid-point of the Bay but a few islands, the purpose of New York's retention of sovereignty over those islands must have been to further its control over navigation and commerce. The states cannot have intended to frustrate this aim by dividing jurisdiction immediately upon the (perfectly foreseeable) addition of landfill to these islands.

This in turn clarifies the significance of "the absence of any allusions" to landfill in Article Second. As between the two states, New York was awarded entire sovereignty over the islands in New York Bay. In view of the completeness and the purpose of this grant to New York, it is improbable that the Commissioners meant such sovereignty to be undone in the likely event that landfill was added to any of these islands. The Compact's silence on the subject thus requires an inference exactly the opposite of the Special Master's: Not that Article Second would have contained a reference to landfill if "such territorial expansion [had been] contemplated" (R 92), but rather that, in the absence of any limiting language in the Compact, the foreseeable use of landfill could not compromise New York's sovereign rights.

There is, finally, no avoiding this interpretation through resort to "this Court's application of the doctrines of accretion and avulsion in original jurisdiction cases." As the Court has indicated, these common-law doctrines apply only when an interstate compact does not address the issues they might otherwise be invoked to resolve. *See Shapleigh v. Mier*, 299 U.S. 468, 470 (1937) (despite "the ordinary rule [that] a change of location resulting from avulsion" cannot change sovereignty, "[h]ere a different rule applied by force of a convention" between Mexico and the United States). In other words, a disposition of land by treaty, convention or compact has the effect of displacing the otherwise-applicable common law. And that is what has occurred in this case. By 1834 the practice of adding territory through the use of landfill was so widely undertaken and accepted that it required no mention in the Compact to have been contemplated by the framers. As the Second Circuit recognized in *Collins*, the Compact envisioned that New York, as a dimension of its control over navigation and commerce in New York Bay, would be sovereign over an expanded (or indeed diminished) "Ellis Island." The Special Master erred in finding otherwise.

Nor is this outcome altered by acceptance of the Special Master's conclusion that "Ellis Island" consisted of "three islands for at least a brief period in time" (R 95). As discussed below, this conclusion is itself erroneous. But in any event, there is no question that New York's assertion of sovereignty derives from its retention of jurisdiction over "Ellis Island" in Article Second of the Compact. New York's undisputed actual possession of the original Ellis Island pursuant to the Compact, coupled with New Jersey's failure ever to possess or assert any sovereignty over the filled portions of the Island, means that New York -- quite aside from its actual exercise of sovereignty over the filled portions of the Island -- may lay claim to the entirety of Ellis Island.

Thus, for example, in *Michigan v. Wisconsin*, 270 U.S. 295 (1926), Wisconsin had "for a period of more than half a century" exercised "undisputed and undisturbed possession of substantially all of the islands in" a particular section of the Menominee River between Michigan and Wisconsin. *Id.* at 310. Michigan nonetheless asserted a claim to the remaining islands, which "ha[d] never been surveyed or any definite acts of dominion exercised over them by either state." *Id.* at 313. Wisconsin's "assertion and exercise of dominion" over the islands it *had* occupied was undertaken "in virtue of, and in reliance upon . . . the Wisconsin Enabling Act." *Id.*

This was enough to entitle Wisconsin to the remaining islands. As the Court noted, "actual possession of a part of a tract by one who claims the larger tract, under color of title describing it, extends his possession to the entire tract in the absence of actual adverse possession of some part of it by another." *Id.* Thus, because the Wisconsin Enabling Act "gave color of title in that state to all of the islands within the limits there described," Wisconsin's

> continued possession, assertion, and exercise of dominion and jurisdiction over a part of these islands . . . extended [its] possession, dominion, and jurisdiction to all of them, in the absence of actual possession of, or exercise of dominion over, any territory within the boundary by Michigan. *The fact that the islands constitute separate tracts of land is of no consequence here, whatever its effect might be under other conditions. In applying the rule, the area within the described boundary, both land and water,*

must be considered as together constituting a single tract of territory. Id. at 313-314 (emphasis supplied).

The same analysis applies to Ellis Island. The Compact reserves "Ellis Island" to New York, untrammelled by any rights to the Island awarded to New Jersey and subject only to such jurisdiction as New York had ceded to the United States in 1800. Even if the landfill additions to Ellis Island, at some "synaptic moment in time," took the form of separate "islands" (R 96), that fact is of no consequence. The Compact gave New York "color of title" and jurisdiction over everything that was Ellis Island, and everything constituting that Island is "a single tract of territory." As discussed *infra* Point II, New Jersey undertook no "actual possession of, or exercise of dominion over," any portion of Ellis Island. Accordingly, whether "Ellis Island" was one island, two, or three, it was and is New York's.

The fact remains, however, that Ellis Island *was* a single island. This is most obviously the case with respect to "Island No. 2." Before construction of this extension, the westernmost point of Ellis Island was a 1200-foot breakwater that formed the western side of the "ferry slip" (NY 932 pp 38, 40; T 2966-2967). This protected landing for ferries formed a "U," of which the breakwater was the western side and a bulkhead enclosing recently-added landfill was the eastern side (NY 952, pp 29-31; NY 932, p 40). The architectural plans for the "hospital extension" depict a ferry house built on artificial fill and connecting the older and newer landfill (T 2038-2041; NY 952 p 36). The bulkheads for the new and old landfill and the connection between them had been constructed at the same time and of identical material: timber "cribs" loaded with rocks, sunk to the bottom of the Bay and filled with ash to make them impermeable to water (T 2963-2965, 2975; NY 932 pp 38-44). The breakwater became the eastern portion of the bulkhead holding in the new landfill, while the cribbing at the northern end of the ferry slip supported the ferry house, which was built on pilings embedded in the cribbing (T 2972, 2985). The ferry house itself and the waiting rooms on either side of it served as the above-water connection between the old and new portions of landfill (NY 952 p 577; NY 74 p 1213).

No one affiliated with Ellis Island immediately after the three-acre hospital extension was completed and the hospital upon it opened in 1902 regarded that extension as anything but a part of Ellis Island. When discussions began in 1902 about the use of further landfill on which to build

the contagious disease hospital, the Supervising Engineer spoke of Island No. 2 as a "three acre addition to Ellis Island" (NY 952 p 505). Similarly, in 1905, the Commissioner of the Ellis Island Immigration Station referred to "that portion of Ellis Island known as the Hospital Island" (NY 638). That same year, the Commissioner General of Immigration envisioned the contagious disease hospital as requiring "construction of an artificial island adjoining Ellis Island" (NJ 369). And even New Jersey, in identifying the 1899 landfill on the map it prepared for its 1904 conveyance of subaqueous land to the federal government, *see infra* pp. 30-31, called it the "hospital extension" (NJ 7).

The sole suggestion in the record before the Special Master that the hospital extension was a separate island is a June 1901 photograph of the ferry house showing water flowing between its supporting piles (R App E). On the basis of this photograph, the Special Master concluded "that Island Number Two was surrounded by water at one time" (R 96). As explained at trial, however, the timber cribbing in which the supporting piles were embedded was itself built up to the high water line at the ferry house (T 2965-2974). Because June is a month when the tides in New York Bay are high, the water in the photograph obscures the solid cribbing supporting the piles (T 3315-3316). Despite the fact that under some circumstances water flowed the full length of the western and eastern sides of the ferry slip between the old and new landfill, the hospital extension known as "Island No. 2" remained a part of Ellis Island, connected to the earlier landfill by the ferry house itself and the cribbing on which it was built.

As to the landfill added in 1905-1906 for the contagious disease hospital: After the crib bulkheads were emplaced for containment of this landfill, it was connected to the existing hospital extension by a plank-faced, pile-supported "gangway" between the newer and older portions of fill (NJ 368; NY 662; T 3065, 3110). During World War I, the United States Army replaced this open gangway with a covered way (NY 952 p 468); the first sections of additional landfill between the two extensions were added in the early 1920's (NY 952 p 7). At no point were the two areas of fill ever unconnected.

Ultimately, however, as discussed above, the Court need not determine whether "Ellis Island" was, at any point in its history, one island, two, or three. The 1834 Compact between New York and New Jersey awarded "Ellis Island," without limitation, to New York, at a time when

reclamation, by means of landfill, of subaqueous lands adjacent to fast lands was so common in and around New York Harbor as to be taken for granted and require no special mention in Article Second. This retention of sovereignty furthered one of the central purposes of the Compact: To allow New York to continue to exercise authority over commerce and navigation in New York Harbor. Moreover, New York's assertion of sovereignty over "Ellis Island" pursuant to the Compact, and its presence on the Island unopposed by any actual possession of any part of the Island by New Jersey, entitles it to all of the Island. However it is regarded, the "Ellis Island" envisioned by the Compact and awarded to New York embraces all of Ellis Island as it exists today.

POINT II

NEW YORK HAS OBTAINED SOVEREIGNTY OVER ELLIS ISLAND THROUGH ITS EXERCISE OF DOMINION OVER THE ISLAND AND NEW JERSEY'S ACQUIESCENCE IN THAT EXERCISE

Even without the Compact, New York is entitled to include within its sovereign territory the entirety of Ellis Island as it is today. As this Court has noted, "[t]here is a 'general principle of public law' that, as between States, a 'long acquiescence in the possession of territory under a claim of right and in the exercise of dominion and sovereignty over it, is conclusive of the rightful authority.'" *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991) (cit om). This doctrine of "prescription and acquiescence" requires that the state asserting it show by a preponderance of the evidence both its own "long and continuous possession of, and assertion of sovereignty over, the territory" in question and the opposing state's "long acquiescence in those acts of possession and jurisdiction." *Id.* Because New York has sufficiently demonstrated both its prescriptive acts over Ellis Island and New Jersey's acquiescence therein, it is sovereign over Ellis Island regardless of how the Compact is interpreted.

The Court has recognized that prescription and acquiescence is analogous to the operation of adverse possession: " '[T]he uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as . . . a similar possession by an individual excludes the claim of every other person to the article of property in question.' " *Virginia v. Tennessee*, 148 U.S. 503, 524

(1893) (cit om). And just as a claim of title, once extinguished by adverse possession for a given period, cannot be revived, *see, e.g., Sharon v. Tucker*, 144 U.S. 533, 543-544 (1892), so a sufficient exercise of dominion for a sufficient period of time by a state extinguishes permanently a claim of sovereignty by another state. Thus, for example, in *Georgia v. South Carolina*, 497 U.S. 376 (1990), an original jurisdiction case brought in 1977, South Carolina conceded that Georgia had undertaken acts of dominion and control over certain disputed territory as early as the 1950s. Nonetheless, South Carolina's prior exercise of dominion over the territory and Georgia's acquiescence in that exercise meant the territory belonged to South Carolina. *Id.* at 391-392; *see also Michigan v. Wisconsin*, 270 U.S. at 306-307 (Michigan's attempt to exercise dominion fifteen years before filing suit but after sixty years of acquiescence in Wisconsin's sovereignty was ineffective).

New York's entitlement to all of Ellis Island as it existed before 1890 is conceded by New Jersey. In 1955, after Ellis Island was declared surplus federal property, New Jersey state and local officials, although uncertain as to their state's authority over the Island, began offering public comments about the uses to which the Island might be put (NJ 96, 97, 99, 402). But by then it was too late. During the entire "immigration period" in the interim, from 1890 to 1954, New York possessed and exercised dominion over Ellis Island, while New Jersey acquiesced in that exercise. This "long acquiescence" by New Jersey in New York's possession of and dominion over Ellis Island is sufficient, quite apart from the 1834 Compact, to entitle New York to include the Island within its sovereign territory today.

A. New York Engaged In Sufficient Acts of Dominion Over the Filled Portions of Ellis Island to Give Rise to Prescriptive Rights to the Island

Before, throughout and after the immigration period New York acted in the areas of voting, health, vital records, labor, law enforcement and marriage on Ellis Island. These powers were exercised on both the filled and unfilled portions of the Island. Throughout this period, the federal government almost universally regarded Ellis Island as in New York, without regard to whether the filled or unfilled portion of the Island was in question. The evidence on this matter is not, as the Special Master believed, "scant," "isolated" or "episodic" (R 118). It is overwhelming.

It is first of all of little consequence to New York's argument that the United States exercised a measure of jurisdiction over Ellis Island pursuant to New York's grant of jurisdiction in 1800 and deed in 1808. As the Special Master recognized (R 110), a state may demonstrate prescriptive acts even over disputed territory occupied by the United States. *See, e.g., Arkansas v. Tennessee*, 310 U.S. 563, 571 (1940) (Tennessee acquired by prescription territory to which United States holds title). Obviously, New York's exercise of jurisdiction was not as extensive as it might have been had the United States not shared jurisdiction over Ellis Island. But such jurisdiction as there was to be exercised by a state was exercised exclusively by New York, and never by New Jersey.

Thus, for example, throughout (as well as before and after) the immigration period, Ellis Island -- without any distinction between its "original" and filled portions -- has been placed in New York County and New York City by state statute. *See* 1882 N.Y. Laws, ch. 410, § 1; 1897 N.Y. Laws, ch. 378; 1901 N.Y. Laws, ch. 466, § 1. The Island is and always has been a component of New York Congressional Districts, as well as its State Assembly Districts (NY 52-58, 457, 970; T 2394-2398) and State Senate Districts, *see, e.g.*, N.Y. Const. of 1894, art. III, § 3; N.Y. Const. of 1938, art. III, § 3.

Moreover, the residents of Ellis Island actually voted in New York -- a significant dimension of a state's exercise of prescription over disputed territory. *See, e.g., Arkansas v. Tennessee*, 310 U.S. at 567; *Michigan v. Wisconsin*, 270 U.S. at 317. The Island's residents, most of them affiliated with the Ellis Island hospitals, lived exclusively on the filled portions of the Island; there were never any residence facilities for staff on the "original" portion of the Island (T 2066, 2071; NY 74 pp 1224, 1253). Over a period of decades[6], New York voter registration lists bear the names of people who variously list their residences on Ellis Island as "El Hospital" (NY 53), "#3 Island" or "#2 Island" (NY 54), "H [i.e., "hospital"]" (NY 55), "El Staff House" (NY 56), "Isl. #3" or "Isl. #2" (NY 953), "Marine Hospital" (NY 954, 956), or "2" or "3" (NY 955). The listings signify that these people lived on the filled portions of Ellis Island and voted in New York.

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[6]New York presented voting records from 1917, 1918, 1919, 1925, 1926, 1930, 1936, 1939, 1945, and 1953 (NY 52-58, 953-956).

New York also was responsible for keeping records of the vital events that took place on Ellis Island. A series of 23 birth certificates indicates that the births of children on Ellis Island were recorded by New York. Seventeen of these certificates are dated before the 1897 fire (NY 24-40). Two additional certificates, from 1904 and 1908, identify the place of birth as, respectively, "Emmigrant Hosp. E.I." and "Ellis Island Hospital" -- that is, the hospital on Island No. 2 (NY 41, 44). Three other certificates from 1909, 1921 and 1922 identify the place of birth only as "Ellis Island, N.Y." (NY 23, 42, 149), but it seems reasonable to infer that the births occurred in the hospital at Ellis Island and therefore on filled land.

Death certificates on Ellis Island were likewise issued by New York. Twenty-two such certificates appear in the record (NY 1-22). All but one identify the "institution" in which the death occurred as "U.S. Marine Hospital #43 Ellis Island N.Y." (NY 2-22). In the Special Master's view, New York could not prove that the births and deaths it "documented occurred on the Island, let alone the landfilled portion" (R 114-115). But the births and deaths occurred at the Marine Hospital on Ellis Island, and the hospital was situated on landfill.[7]

Marriages on Ellis Island likewise occurred in New York, a relevant factor in determining sovereignty over disputed territory, *see Arkansas v. Tennessee*, 310 U.S. at 567. The record contains six New York marriage certificates, four from 1901 (NY 46-49) and two from 1914 (NY 45, 150), listing either the bride's or the groom's residence as Ellis Island. Indeed, when in 1907 the New York State Legislature passed a statute requiring that marriage licenses be obtained from the clerk of the town or city in which "the woman to be married resides" or "in which the marriage is to be performed," 1907 N.Y. Laws, ch. 742, § 8, the Commissioner of Immigration at Ellis Island, noting that "a number of marriages are consummated at Ellis Island," sought advice "as to whether it will be necessary for this provision of the New York State laws to be complied with" (NY 657). The Commissioner-General of Immigration responded that

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[7]The Special Master was troubled by "[t]he few birth certificates" submitted by New York and the fact that "[t]he death certificates are almost all from one year" (R 114). The prejudice caused New York in accumulating such evidence by New Jersey's long delay in commencing this action is discussed at Point III, *infra*.

it would, for "there is no Federal statute on the subject of marriage [,] and therefore it seems only reasonable and proper that the laws of the particular jurisdiction shall be complied with" (NY 657).

The Special Master nonetheless believed that "[t]here is no conclusive evidence that the marriages represented by the marriage certificates took place on the Island" (R 114-115). Although the 1914 marriages may have taken place on Manhattan Island, all evidence indicates that the 1901 marriages -- and hundreds more like them -- actually occurred on Ellis Island. The Special Master complained that the memoirs of Fiorello LaGuardia, the former mayor of New York City who worked as an interpreter at Ellis Island between 1907 and 1910, "describe having travelled to Manhattan with couples so they could get married, but d[o] not include recollections of marriages having occurred on the Island" (R 114-115). Other record evidence, however, contains such recollections. The memoirs of Edward Corsi, Commissioner of Immigration at Ellis Island between 1931 and 1934, include an interview with Frank Martocci, a former interpreter at the Island, on the subject of "What It Was Like to Work on Ellis Island in 1907" (NY 74 pp 401-415). According to Martocci, "'[v]ery often brides came over to marry here, and of course we had to act as witnesses. I have no count, but I'm sure I must have helped at hundreds and hundreds of weddings of all nationalities and all types. The weddings were numberless, until they dropped the policy of marrying them at the Island and brought them to City Hall in New York'" (NY 74 p 409).

Both the federal and New York State census bureaus regarded Ellis Island as part of New York, and treated its residents -- all of whom, as noted above, lived on the filled portions of Ellis Island -- as New Yorkers. *See Michigan v. Wisconsin*, 270 U.S. at 316 (where population is enumerated by census is pertinent to prescription and acquiescence). The record before the Special Master included information from the United States censuses for 1900, 1910, 1920, 1940, 1960, and 1970, and the New York State censuses for 1915 and 1925 (NY 59-62, 67-69, 912).

New York provided police and fire-protection services to Ellis Island. The Special Master acknowledged but made nothing of this fact, which obviously has bearing upon state sovereignty. *See, e.g., Georgia v. South Carolina*, 497 U.S. at 392-93. Edward Corsi noted that, in the 1897 fire, "New York rushed twenty policemen to keep order among the panic-stricken immigrants." Edward Corsi, *In the Shadow of Liberty* 114 (1935).

In 1934, when there was a fatality in a construction accident on the filled portion of Ellis Island, it was the New York police who responded and investigated (NY 293-297). Similarly, when in 1916 the seawall cribbing of Ellis Island caught fire after a nearby explosion, the New York City fire department and fireboats from New York City extinguished the fire (NY 933 p 20; T 2408). Indeed, when, in 1991 and 1992, New York City sought to curtail its fire-protection activities in New York Harbor, the Port Authority demurred, insisting that, since the 1834 Compact, "[t]he City of New York has historically provided fireboat protection for the waterfront areas of New York Harbor, including both sides of the Hudson River" (NY 917, 918).

The Special Master also overlooked the extensive application of New York State and New York City standards to labor performed on Ellis Island during the immigration period. Contracts from 1905, 1932, 1934 and 1945 called for work on the landfilled portion of the Island to be completed in accordance with formal New York City performance requirements (NY 608, 638, 794, 795). When immigration officials sought to establish wage rates and construction costs on the Island, they referred to prevailing rates in New York City. Thus, documents in the record from 1906, 1909 and 1910 show Ellis Island officials consulting the prevailing wages and prices in New York City to ascertain the rate to be paid for construction on the landfilled portion of the Island (NY 627-628, 636, 647). Similarly, New York City salaries were invariably used in documents from 1903 through 1925 as the benchmarks to determine what federal employees on Ellis Island, including the landfilled portion, should be paid (NY 661, 759, 355-56, 321, 323, 636).

This state of affairs did not change with enactment of the Davis-Bacon Act, 46 Stat. 1494 (1931), which provided that workers on "any public buildings of the United States" be paid at a rate "not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or civil division of the State in which the public buildings are located." Depression-era contracts for construction on Ellis Island, including the landfilled portion, routinely contained a term requiring that contractors pay their employees the "prevailing rate of wages of the City of New York" (NY 789, 794, 607-608, 799, 810, 811, 792, 814, 793). Similarly, both before and after the enactment of the Buck Act, 49 Stat. 1938 (1936), authorizing application to all United States property "which is within the exterior boundaries of any State" of that state's workmen's compensation law, New York workmen's compensation law was applied to claims arising from

work on the filled portions of Ellis Island (NY 283, 284, 306, 363, 795, 802).

The Special Master rejected this evidence in a single sentence. He noted that an INS historian who testified on behalf of New Jersey indicated that the United States "was not bound to" rely on New York State standards in federal construction projects (R 117). While this may be technically correct, the Special Master misses the point. Where actual state jurisdiction was in question on Ellis Island, such jurisdiction as could be exercised by a state was always exercised by New York, never by New Jersey. Other aspects of the relationship between New York and Ellis Island, such as the exclusive use of New York standards as a benchmark in construction and labor matters on both the filled and unfilled sections of the Island, demonstrate that those who oversaw and dealt with federal affairs on Ellis Island regarded New York as the state of which the Island was a part.

There is no question that all three branches of the federal government believed that Ellis Island was in New York. *See Michigan v. Wisconsin*, 270 U.S. at 317 (views of United States government probative of state sovereignty). Over the course of the immigration period, the INS was part of four different federal agencies, but at all times it regarded Ellis Island as part of New York. Letters and other documents originating with INS throughout this period identify "Ellis Island" -- often including specific references to the filled portions thereof -- as in New York (in chronological order: NY 387, 381, 374, 552, 631, 637, 551, 613, 610, 630, 171, 174, 732, 619, 354, 755, 162, 349, 350, 348, 607, 774, 512, 262, 468, 511, 163, 736, 142, 155, 140, 737, 160, 159). As the INS Assistant Commissioner General put it in 1923, "the Bureau has always considered Ellis Island as a part of the State of New York" (NY 971).

Other federal agencies which did business on or with Ellis Island also believed it was in New York. The Department of Public Health, which operated the hospital on Island No. 2, considered it to lie in New York (NY 137-139, 469, 618, 645, 668, 734). The Navy Department, which occupied filled portions of the Island during and immediately after World War I, thought it was operating in New York (NY 671-725). So did the Procurement Division of the Public Works Branch of the Department of the Treasury, which oversaw the Depression-era construction projects on the filled and unfilled portions of the Island (NY 207, 254, 273, 280, 301, 358). The Department of Justice, representing the Procurement Division in a 1936

lawsuit concerning a contract for labor on Ellis Island landfill, believed that work had occurred at "Ellis Island, New York" (NY 510, 532-533). At least one President shared this view. In his 1910 message to Congress, President Taft referred to "Ellis Island in the City of New York" (NY 186). And when, in 1954, the federal government inventoried its real property holdings, it identified the entirety of Ellis Island as in "New Jersey, Geographically -- New York Jurisdictionally" (NY 972).

The federal judiciary likewise believed that jurisdiction over matters involving Ellis Island was in the federal courts seated in New York.[8] Federal proceedings involving the detention and deportation of aliens at Ellis Island were prosecuted in the Southern District of New York (NY 196-204). Indeed, on one occasion the Court of Appeals for the Third Circuit dismissed an Ellis Island-related deportation matter for lack of "territorial jurisdiction." *United States ex rel. Belardi v. Day*, 50 F.2d 816, 817 (3d Cir. 1931). A 1939 suit arising from a contract performed on the filled portion of the Island was brought in the Southern District of New York (NY 507). The United States Attorneys in New York represented the INS in matters litigated in the federal courts (NY 187, 344, 642).

Congress, too, believed that Ellis Island was in New York. *See Virginia v. Tennessee*, 148 U.S. 503, 516 (1893) ("the legislation of Congress" is relevant to prescription). Its acts appropriating funds for both the filled and "original" parts of the Island referred to "Ellis Island, New York." *See* 35 Stat. 20 (1908); 32 Stat. 1084 (1903); 30 Stat. 113 (1897). When in 1917 the House Committee on Rules conducted hearings on a resolution involving Ellis Island, it regarded these hearings as "Concerning Conditions at Ellis Island Immigration Station, N.Y." (NY 74 p 1297). Indeed, at least one New Jersey Senator shared the view of his colleagues. In 1934, Senator Hamilton F. Kean wrote to the Procurement Division concerning certain new construction on landfill at Ellis Island. Senator Kean identified the location of this project as "Ellis Island, New York" (NY 292).

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[8]The New York state courts also had jurisdiction over certain Ellis Island matters. *See Rettig v. John E. Moore Co.*, 154 N.Y.S. 124 (N.Y. App. Term 1915) (civil action for assault committed "upon government property at Ellis Island").

Finally, quite aside from official acts and documents, there is the question of where those who resided on Ellis Island -- that is, on the filled portions of the Island -- believed that they lived. Necessarily, there is less of this sort of evidence than any other. As discussed *infra* Point III, New Jersey's delay in bringing this suit has deprived New York of both the testimony and documents of most individuals who might shed light on the question. But there is nothing ambiguous about the evidence that remains. In 1905, a personnel form prepared by a woman working on Ellis Island as a "matron" listed her "P.O. Address" as "New York City -- Ellis Island" (NY 64). In 1908 and 1909, a total of four individuals who witnessed INS contracts listed their residences as "Ellis Island, New York" (NY 609, 615, 617, 625, 633). In 1920, an army nurse employed on Ellis Island who petitioned the United States of America for naturalization indicated that her residence was "Ellis Island, New York Harbor"; one of the witnesses to the petition gave her address as "Ellis Is., NY" (NY 63). A man who, as an infant in 1940-1941, lived with his family in staff quarters on the landfilled portion of Ellis Island, states that his family believed itself to have resided in New York (T 3145-46). And of course, throughout the immigration period, residents of Ellis Island went to the polls in New York State and New York City elections (NY 52-58).

In sharp contrast to the abundant evidence of New York's assertion of sovereignty over and possession of Ellis Island, New Jersey can put nothing in the other pan of the scale. The handful of incidents on which New Jersey relies for a demonstration of its "counter-prescription" are discussed in the next section. But there is, quite simply, no evidence that anyone who lived on, worked at, or passed through Ellis Island during the immigration period believed that the Island was in New Jersey.

The Special Master thus erred entirely in concluding that New York offered evidence only of "isolated or episodic prescriptive actions . . . without certainty that these acts occurred on the landfill," and therefore failed to "prove prescription over the landfill" (R 118). Evidence of New York's continuous exercise of authority over Ellis Island is abundant, especially in view of the prejudice caused New York in discovering witnesses and retrieving documents by New Jersey's delay in filing suit. It is clear, moreover, that this authority was exercised over the filled and "original" portions of the Island alike. Because New York has thus shown its long and continuous possession of and dominion over the entirety of Ellis

Island, it has demonstrated its prescriptive right to assert its sovereignty over the whole Island.

B. New Jersey Acquiesced in New York's Exercise of Sovereignty over Ellis Island

In 1955, after Ellis Island had been abandoned by the INS and declared surplus federal property, various New Jerseyites -- not unlike distant relatives who have neglected the deceased while he was alive but still hope to inherit his estate -- began suggesting ways to make use of the Island. During (and before) the entire immigration period, however, New Jersey acquiesced in New York's assertion of authority over Ellis Island. The handful of acts and incidents proffered by New Jersey and accepted by the Special Master as indications of its nonacquiescence is not sufficient, even in the aggregate, to defeat New York's exercise of prescription over Ellis Island.

The Special Master first discusses (R 124-126) the United States' 1904 acquisition, at the insistence of the New Jersey Board of Riparian Commissioners, of a deed to the subaqueous land around Ellis Island (NJ 7, 351), much of which had been filled by the time of the deed. What is noteworthy about this deed and the events leading up to it is their irrelevance to any exercise of dominion over Ellis Island itself. The Board of Riparian Commissioners was empowered by New Jersey statute only to lease, sell and otherwise deal with "the lands lying under the waters of the bay of New York and elsewhere in the state." 1891 N.J. Laws ch. 123. By its own account, this Board was "not charged with anything except the sale of land which happens to be under water" (NJ 332 p 10). Thus, in 1890, when it learned of the United States' reclamation of the subaqueous land around Ellis Island, it did not act directly, instead calling "the attention of the Governor . . . to such unlawful occupation" (NJ 383[a]).

Nothing came of this effort. It remained to the Riparian Board to obtain what it was authorized to get: compensation for subaqueous land that New Jersey owned. Thus, in 1901, it took steps "to establish the right of the State of New Jersey to the lands under water" (NJ 3). And in 1904 United States Attorney General William H. Moody concluded "that the ownership of the[se] lands . . . is in the State of New Jersey" and, in furtherance of federal-state comity, obtained a deed to the land "for the nominal consideration of $1000" (NJ 4, 351).

The most notable aspect of this episode is the distinction it preserves between jurisdiction over Ellis Island and ownership of the subaqueous land surrounding it. The Riparian Board had authority only to "get as much" as it could for this land (NJ 332 p 8). Having done so, the Board's interest in the land, and New Jersey's interest in Ellis Island, was at an end, presumably because the Governor of New Jersey, the Riparian Board and the remainder of New Jersey State government understood that fast land added to Ellis Island became, under the 1834 Compact, part of New York.

The Special Master also discusses (R 118-122) an erroneous map created in 1890. The map displays "Pierhead and Bulkhead Lines for Ellis Island, New Jersey, New York Harbor [,] as recommended by the New York Harbor Line Board" (NJ 330 [1-8]). The Harbor Line Board was a federal organization created in response to fears of encroachment upon the nation's harbors and the navigability of its waters by reclamation of subaqueous land undertaken by riparian owners (NY 932 pp 20-22). It regulated, subject to the Secretary of War's approval, the "pierhead lines" (i.e., the furthest permissible extent of pile-supported structures) and "bulkhead lines" (i.e., the furthest permissible extent of solid fill) in American harbors (NY 932 p 20; T 2902).

The first appearance of the map in question, in June 1890, shows Ellis Island and its recommended pierhead and bulkhead lines as they existed prior to expansion of the Island (NJ 330[1]). As Ellis Island expanded, the recommended harbor lines changed accordingly. The same map, identical in all respects to the 1890 map except that the harbor lines were changed and different signatures of approval appear, was reused in 1896, 1897, 1901 and 1911 (NJ 330[2],[5],[6],[7],[8]).

In the Special Master's view, the chief "significance of these maps is that they [i.e. the 1901 and 1911 maps] were approved by the Secretary of War, Elihu Root," a prominent New Yorker, "and produced over his signature" (R 119). The other Harbor Line Maps, the Special Master added, are significant because they "sugges[t] that New York's alleged acts of dominion and possession . . . over the landfilled portions of the Island, were not so conspicuous or continuous as to change the view of the Army concerning which State was sovereign" (R 120-121).

Everything the Special Master says about the Harbor Line Board maps is questionable. The most conspicuous aspect of the maps is, of

course, their erroneousness. As New Jersey concedes, "Ellis Island, New Jersey" is a misnomer. The "original" island, which is all that was depicted on the 1890 map, undisputedly belongs to New York. It is easy to understand how such an error occurred. The Harbor Line Board was a federal agency, and in its task of establishing harbor lines was indifferent to state boundaries. The 1890 mapmaker would not have been overly concerned with precise territorial boundaries.

The Special Master, while appearing to acknowledge this mapmaker's error, deemed it probative of "the United States' acceptance of New Jersey's legal position" that "the title on the map was reproduced subsequent to 1890" (R 120 n 45). But the repetition of the error is as easily explained as its cause. First, the 1890 map was not published. It was used simply to make recommendations to the Secretary of War which, if approved, would require no further action to become effective (T 2902-2903).

Moreover, changing this map was not a simple process. As New York indicated at trial, the maps were most likely produced from a single copper engraving, thus accounting for the identity among them of many signatures, the legend, the bathymetry, and other details, including the "Ellis Island, New Jersey" error (T 2910-2913). Only certain signatures of approval and the harbor lines themselves changed from map to map, suggesting that these features alone might have been added on paper copies of the map rather than the original engraving. It would have taken a skilled engraver to modify the original map (T 3090-3092). Given the difficulty of the process and the irrelevance of state boundaries to the task of establishing harbor lines, it is easy to see why no change was made, even if someone had noticed the error.

It is similarly easy to understand how Elihu Root -- who undoubtedly had more to concern him in 1901 than a mistaken designation, correctable only by a skilled artisan, on an intradepartmental document -- might have overlooked the map's error or deemed its correction not worth undertaking. And beyond the slightest question, the Special Master's conclusion that Root "actually signed these maps" (R 119 n 45) is wrong, for Root was Secretary of War only between 1899 and 1904, and his purported "signature" on the 1911 map, though dated 1901, unmistakably differs from the 1901 "Root" signature (N.J. 330[7], [8]).

Thus, the 1890 Harbor Line Board map, as reprinted through 1911, neither undermines New York's prescription over the filled portions of Ellis Island nor stands as an instance of New Jersey's nonacquiescence. The map's designation of "Ellis Island, New Jersey" was an error to begin with, and would not have been worth the trouble of changing even if someone had noticed it. And the chief significance the Special Master found in the map -- Elihu Root's signature upon it -- vanishes in view of Root's probable indifference to the error and the uncertain authenticity of the signature.

Other than the erroneous Harbor Line Board maps,[9] New Jersey points to little between 1904 and 1933 that gives color to its claim of nonacquiescence. Puzzlingly, the Special Master relies on the Port Authority Amendment to the 1834 Compact. This 1921 agreement between New York and New Jersey provides that "[t]he territorial or boundary lines established by the [1834 Compact], or the jurisdiction of the two states established thereby, shall not be changed except as herein specifically modified." N.Y. Unconsol. Laws § 6421 (McKinney 1979). It says nothing whatever about Ellis Island. Similarly, the "voluminous" 1919 Report (NJ 408) of the Commissioners who devised the Amendment "does not discuss Ellis Island" (R 126).

To the Special Master, this silence was "a tacit recognition of federal hegemony over the Island" (R 128), and somehow "also serves as evidence of New Jersey's non-acquiescence," for "both States had the opportunity to discuss any and all issues of State activity in and around New York Harbor," and did not discuss Ellis Island (R 129). Both inferences are unwarranted. First, there is no showing that either state imagined (inaccurately) that an

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[9]The Special Master did not mention a 1915 Harbor Line Board map showing "Pierhead and Bulkhead Lines for the Westerly Shore of the Upper Bay New York Harbor [,]3 Clifton, S.I. to Hudson River [,] including the Northeast Shore of Staten Island, N.Y. [,] Jersey Flats and Ellis Island, N.J." (NJ 384). The map reflects modifications of harbor lines elsewhere in New York Harbor; it does not purport to change the harbor lines for Ellis Island, which are said to "conform closely" to the lines established in 1890 and modified through 1911 (NJ 384). What is true of the Harbor Line Board maps actually establishing or changing harbor lines on Ellis Island is true *a fortiori* for this 1915 map: the misidentification of Ellis Island in this intradepartmental document might have gone unnoticed or, if noticed, been deemed insignificant or irrelevant in a map that had no bearing whatsoever on Ellis Island itself.

exercise of federal jurisdiction over territory within a state's boundaries rendered irrelevant the state's jurisdiction. Moreover, the likeliest conclusion to be drawn from the Commissioners' total silence as to Ellis Island is the one the Special Master rejects: "that the silence showed the views of one State with respect to her sovereignty were clearly accepted by the other" (R 128). Since, with the exception of the erroneous Harbor Line Board maps, every extant document between 1904 and 1933 suggests that all of Ellis Island is under the jurisdiction of New York, it is clear which views prevailed at the time of the Port Authority Amendment.

The Special Master briefly notes (R 123, 131) that -- apparently as early as 1924 -- Hudson County, New Jersey added both Ellis Island and Bedloe's Island to its tax rolls as exempt property, without distinguishing between the filled and unfilled portions of the Island (NJ 470-471). The motive and basis for this act remain obscure. It was in any event a well-kept secret, unknown not only to the United States and the State of New York but also, prior to 1992, to the State of New Jersey itself (NY 751-752). It can hardly stand as an instance of that state's nonacquiescence.

The Special Master relies heavily on several incidents in the 1930's to support New Jersey's supposed nonacquiescence in New York's exercise of sovereignty over Ellis Island. He mentions that, in 1933, Edward Corsi, the New Yorker who was then Commissioner of Immigration at Ellis Island, applied for a New Jersey waterfront development permit in connection with construction work on the seawall around Ellis Island (R 123, 134-135). What he fails to note is that the application itself, in identifying "Where work is contemplated," lists "New York" as the location (NJ 10). The application thus cannot be counted as an acknowledgment of New Jersey's sovereignty. Corsi may have regarded the subaqueous land surrounding Ellis Island, on which the construction was to occur, as part of New Jersey. He may have applied for the permit because the 1914 New Jersey statute empowering the Board that issued it requires that Board to investigate and report on "matter[s] incident to the movement of commerce upon all navigable rivers and waters within this State *or bounding thereon*," N.J.S.A. § 12:5-1 (West 1996) (emphasis supplied). But whatever his reason, "Ellis Island," in Corsi's view, including the filled portion, remained in New York.

Similarly, the Special Master mentions "a federal government application to New Jersey for a permit to construct a water main for Ellis Island in 1937" (R 123). The permit in question involved repairs to a water

main that stretched from Ellis Island to the shoreline of Jersey City (NY 471, 473-475, 477-488, 490-492). The United States was simply seeking a permit from New Jersey for work on New Jersey subaqueous lands. Indeed, letters and plans prepared by the United States Treasury Department in 1937 regarding easements obtained in connection with the water main repairs and submitted to New Jersey with the application depict the Ellis Island section of the water main as "Ellis Island, New York" (NY 474, 490-491).

The Special Master also mentions (R 135) a 1933 letter from federal Assistant Secretary of the Treasury L.W. Robert, Jr. to the Department of War, referring to a construction project at "the Ellis Island, New Jersey, Immigration Station" (NJ 374). Perhaps because of this misidentification, six subsequent internal Department of War documents dealing with the project refer to "Ellis Island, New Jersey" (NJ 375-377, 379-381), although the Assistant Secretary of War's response to Robert's letter is careful to identify the location of the project as "Ellis Island, New York" (NJ 378). And indeed, in a letter three months later, Robert referred to the same project as occurring at "Ellis Island, New York" (NY 302).

In discussing New Jersey's nonacquiescence, the Special Master places greatest emphasis on a 1934 episode initiated by Congresswoman Mary T. Norton of Jersey City (R 132-134). Some historical perspective on this incident helps demonstrate its invalidity as an instance of nonacquiescence.

In 1934, Mayor Frank Hague ran Jersey City. He was a "powerful and ruthless" boss. Dayton D. McKean, *The Boss: The Hague Machine in Action* xiv (1940). "[T]he Washington politicians knew that there was no Democratic organization in New Jersey aside from his," which was "the official state organization through which federal patronage matters would have to be cleared." *Id.* at 102-103. Norton was "Hague's Congresswoman." Richard J. Connors, *A Cycle of Power: The Career of Jersey City Mayor Frank Hague* 86 (1971).

In 1934, as the Special Master noted, "the issue of jobs heated up" (R 132). Hague had orchestrated a "takeover" of the Jersey City unions, which were "friendly satellites in orbit around" him. *Id.* at 100. These unions of course wanted jobs for their members (T 890). During 1934, there was WPA construction work at Ellis Island. Because Ellis Island was

deemed part of New York, however, jobs on the Island went to the New York local branches of unions (NJ 21). This was the setting in which Norton, in May of 1934, wrote to the Assistant Secretary of Labor, informing him "that some of the land upon which buildings are to be erected is in the State of New Jersey and she and Mayor Hague are anxious to have some of this work performed by residents of New Jersey" (NJ 12).

The Labor Department passed the problem on to the Procurement Division of the Public Works Branch of the Treasury Department, which oversaw the project (NJ 14). The Procurement Division, duly advised that "Mrs. Norton and Mayor Hague are interested in seeing that some of the labor on these jobs shall be performed by residents of New Jersey" (NJ 14), got one of the contractors on the project to agree to employ some New Jersey residents (NJ 17). The New Jersey union local remained unsatisfied (NJ 18). Back the matter went to the federal government: from the Procurement Division to the Public Works Administration (NJ 22), and from there to the Federal Emergency Administration of Public Works (NJ 33), which suggested that "[since] Ellis Island is not clearly within the boundary lines of either state and is clearly outside the jurisdiction of either, workers should be drawn in roughly equal proportions from the two States" (NJ 33-34). The matter was then passed on to the Department of Labor, whose Solicitor concluded -- quite erroneously, as the Special Master observed (R 134) -- that, like "the Philippine Islands or Hawaii," Ellis Island and Bedloe's Island "are territories of the United States not falling under the jurisdiction of any one of the forty-eight states" (NJ 43). The Solicitor embraced the "equal proportions" solution, observing that "[i]t seems to me technically skillful, politically wise and thoroughly just" (NJ 43).

Notably absent from this catalogue of attributes was "legally correct," a virtue that seems to have concerned no one until another of the contractors on the project, for the first time in the entire affair, actually investigated the governing law. The contractor called the 1834 Compact to the attention of the Procurement Division (NJ 51), which attempted to turn the matter back over to the Public Works Administration (PWA), noting that "[a]t the time of the earlier [decision], this Division did not have knowledge of such treaty, and it is thought that perhaps it was not considered by you" (NJ 50). The PWA declined to get involved (NJ 51). The decision remained with the Procurement Division, which concluded exactly what the Second Circuit was to conclude fifty-seven years later -- that "Article 2 of

[the 1834 Compact] seems to indicate clearly that New York has jurisdiction over Ellis Island" (NJ 52).

And there the matter remained. Despite Norton's objection that "[a] treaty made in 1834 seems rather antiquated" (NJ 54), the Procurement Division on April 8, 1935 declared that, while "Ellis Island lies within the exterior boundaries of the State of New Jersey," Article Second of the Compact "specified a definite exception to the boundary as established by Article First," and "expresse[d] clearly the intent of the contracting parties that Ellis Island proper should remain in New York State" (NJ 57).

The Special Master mistakes this unsuccessful show of muscle by a member of Congress for an act of state by New Jersey. His erroneous conclusions are threefold. First, he suggests that the episode "diminish[es] New York's prescriptive acts, because [the Solicitor of Labor] posits preemptive federal sovereignty" (R 134). But, as this Court notes and even the Special Master acknowledges, there is no such preemptive federal sovereignty over territory within a state. *See, e.g., Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624, 626 (1953) (United States land within territorial boundary of a state "d[oes] not cease to be a part of" the state). Such jurisdiction as remained for a state to exercise over Ellis Island was exercised entirely by New York.

The Special Master then suggests that the episode also shows "New Jersey's resistance to New York's authority, such as it was, over construction in the filled portions of the Island" (R 134). How a single Congresswoman from Jersey City can represent, in the course of several back-channel letters to federal officers, the entire State of New Jersey, is as unclear as how New York, which played no part in the controversy and seems to have been unaware of it, can be said to have joined battle. And quite aside from this, the Special Master overlooks the fact that Norton appeared to be indifferent to the merits of the matter. She thought she could get something for her constituents by force majeure, and she was very nearly correct. But the idea that her show of strength amounts to "New Jersey's resistance" is wholly unwarranted.

Finally, the Special Master concludes that the entire affair "indicate[s] that the States were communicating about labor issues, and by extension, the sovereignty question" (R 134). This is evidently a reference to the fact that the Bricklayers, Masons and Plasterers' International Union

of America had sought a resolution to the problem "in view of the growing friction between the workers of New York and New Jersey" (NJ 21). To the Special Master, this was apparently an instance of New Jersey "assert[ing] her proprietary and sovereign interests . . . through surrogates such as trade unions" (R 136). The Special Master does not offer and New York cannot locate any law suggesting that a labor union can ever, under any circumstances, act as a "surrogate" for a sovereign state.

Thus, the centerpiece of New Jersey's argument and the Special Master's conclusion that New Jersey did not acquiesce in New York's prescription over the filled portions of Ellis Island cannot bear its heavy burden. Mary Norton's brief and abortive back-channel power play was not an act by the State of New Jersey, did not pretend to be rooted in the legal merits of the matter, and failed as soon as anyone scrutinized it closely.

Nor is the Special Master's final example of nonacquiescence during the immigration period any more persuasive. This was a simple attempt by the federal government, without the knowledge or assistance of either New York or New Jersey, to reduce its labor costs. As noted above, under the Davis-Bacon Act the wage paid on federal government projects was the prevailing rate of the locality in which the project was situated. Before 1947, New York City wage scales were applied to work performed on Ellis Island (NY 504-505, 789, 794, 799-800). In 1947, however, the Department of Labor informed the INS that "the New York building trade wage rates, as such, are not applicable to construction on Ellis Island, as far as the data on file in this office would indicate" (NJ 61). Thereafter, over a two-year period, the Department of Labor applied New Jersey wage rates to Ellis Island projects, including those occurring on the unfilled portion of the Island (NJ 68, 71, 72, 74, 78, 85, 87, 90, 441). Suddenly, in 1949, the Department of Labor advised the INS that, because "additional data and more current information" about Ellis Island "have been assembled," its prior decisions about Ellis Island had been amended and New York rates were to be applied to work on the filled portion of "Ellis Island, New York Harbor, New York County, New York" (NJ 90, 91).

The origins of both the 1947 decision to apply New Jersey rates and the 1949 decision once again to apply New York rates remain obscure. But there is no confusion as to the motive behind the 1947 decision. It was not an attempt to reflect accurately state jurisdiction, present or potential, over the Island. Rather, as New Jersey's expert indicated, "[t]he New Jersey

[wage] scale became the emphasis . . . . [b]ecause it was lower than that of New York" (T 893). Yet again, in this last example of New Jersey's supposed nonacquiescence, there is an erroneous and expedient federal decision, made without notice to the State of New York, that is corrected as soon as its error is detected. To the Special Master, this episode evidently demonstrated that Ellis Island, including both its filled and unfilled portions, "was understood by the federal government to be in New Jersey" (R 135). But "the federal government" -- as embodied by the office of the Solicitor of Labor, which was solely responsible for the decisions in question -- can no more be said to have "understood" that Ellis Island was in New Jersey than can the Solicitor of Labor who in 1934 suggested a "politically wise" decision that had nothing to do with the legal merits of the matter. Expediency led the federal government into an error. When someone bothered to investigate the situation, the error was corrected.

This handful of episodes is the sum of New Jersey's supposed acts of nonacquiescence in New York's exercise of dominion over Ellis Island during the immigration period. The narrative that the Special Master constructs to account for them is implausible and contradictory. He suggests, on the one hand, that New Jersey's long and conspicuous silences are the product not of acquiescence but of New Jersey's serene confidence -- despite New York's exercise of jurisdiction over the routine affairs of the Island -- that Ellis Island was in federal hands, and that New Jersey thus had nothing to which to object. On the other hand, each and every occasion when it occurred to someone, not always a New Jersey citizen and seldom a New Jersey official, that Ellis Island might possibly be (or be fobbed off as being) in New Jersey counts as a vigilant preservation of New Jersey's sovereign rights. But the "counter- prescriptive" episodes relied on by the Special Master are remarkable not only for their infrequency, but also for their error, their brevity, and their informality. The Harbor Line Board mapmaker in 1890, the Assistant Secretary of the Treasury in 1933, the office of the Solicitor of Labor in 1947-1949 -- these were trees falling silently in a very large forest, federal officials and entities whose erroneous statements were made in intra-agency documents and (in the latter two instances) were corrected in short order. So also was the error, made in response to Congresswoman Norton's naked exercise of power and without consulting New York State, of attempting to divide the jobs on federal construction projects between the unions of the two states. Only twice during this period did anyone from New Jersey assert that Ellis Island belonged to that state: Norton, who was indifferent to the legal merits of the

matter, and an anonymous Hudson County tax official, whose claim of jurisdiction over the whole of (tax-exempt) Ellis Island was both mistaken as a matter of law and so obscure that his (or her) own state was unaware of it. The idea that these fugitive acts tell a story of the State of New Jersey's "consistent assertions of her underlying sovereign claims" (R 144)[10] is unsupported by the record.

Instead, the story of Ellis Island during the immigration period that emerges from the case is this: The jurisdiction remaining to be exercised by a state during this period was exercised by New York. The State of New Jersey took no official steps to dispute New York's sovereignty. On occasion, it occurred to someone in the federal government or in the State (though not the state government) of New Jersey, because of either an honest error or simple expediency, that Ellis Island might be in New Jersey. If and when the mistake came to light, it was swiftly corrected. It is, in short, a story of acquiescence in New York's long-standing and extensive exercise of dominion over Ellis Island, and entitles New York to include all of the Island within its territory today.

POINT III

NEW JERSEY IS GUILTY OF LACHES BY VIRTUE OF ITS DELAY IN COMMENCING THIS ACTION

A. Laches Should be Applied to Original Jurisdiction Cases Involving Interstate Compacts

The Special Master erred in failing to apply the doctrine of laches to this case. Laches should be applicable in general, and has been applied by this Court, to disputes between states involving interstate compacts. Nor, as the Special Master erroneously concluded (R 105), can New York's

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[10] The acts of the Board of Riparian Commissioners were, as discussed above, not in the nature of "sovereign claims" and were not claims over the filled portions of the Island. Moreover, even if the 1904 deed is viewed as an instance of nonacquiescence in New York's sovereignty, the outcome of the case does not change. It is the last such instance, and a prescriptive period of more than fifty years is adequate to give sovereignty over the Island to New York. *Cf. Michigan v. Wisconsin*, 270 U.S. at 317 (sixty-year prescriptive period).

concerns about New Jersey's delay in filing suit and the prejudice it has caused New York "be addressed through an analysis of prescription and acquiescence." Laches and prescription and acquiescence apply different criteria in order to vindicate different equitable principles, and are in no way interchangeable.

While this Court has recently noted that it "has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact," *Kansas v. Colorado*, 514 U.S. 673, 687 (1995), the doctrine has been applied in such a dispute by this Court, *see Rhode Island v. Massachusetts*, 40 U.S. (15 Pet.) 233 (1841). The policy considerations underlying the general inapplicability of laches to a sovereign do not apply to disputes between states over interstate compacts.

As the Court has explained,

> [t]he rule *quod nullum tempus occurrit regi* -- that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations -- appears to be a vestigial survival of the prerogative of the Crown. [cit om] But whether or not that accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis. [cit om] "The true reason ... is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers ... ." [cit om]

Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938).

New Jersey should not under any circumstances be permitted to take advantage of this rule, for it could not do so in its own state courts. The New Jersey Supreme Court has abrogated the rule of *nullum tempus* in contract cases, concluding that the rule "does not accord with notions of fundamental justice." *N.J. Educ. Facilities Auth. v. Gruzen*, 592 A.2d 559, 561 (N.J. 1991). Moreover, as *Guaranty Trust* goes on to demonstrate, the policy underlying the Court's unwillingness to apply the doctrine of laches against states obviates any hesitation about applying it in the present case, or in any other case involving one state's assertion of rights against another

under a compact between them. In *Guaranty Trust*, the statute of limitations had run against a claim of the Russian government to certain bank deposits in New York. The Court noted that the defenses of laches and the statute of limitations are themselves rooted in "principles of justice" and "serv[e] a public interest." 304 U.S. at 135, 136. Despite the injustice to the defendant that results, they do not apply against a domestic sovereign because of the countervailing "interest of the domestic community of which the [defendant] is a part." *Id.* at 136. But this reasoning "could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it represents." *Id.* Like considerations govern the present case. The public benefit that accrues to a sovereign through application of the rule of *nullum tempus* outweighs the private advantage gained by a litigant, himself a member of that public, who successfully asserts laches. This analysis changes when the contest is between the public interest of two coequal sovereigns. Where, as here, two states are involved, "the public rights, revenues and property" are at stake no matter which state wins. Whichever state prevails, the interest of the public of the other state will suffer a loss. There is thus every reason to apply the otherwise applicable doctrine of laches if it is necessary for a just disposition of the case.

Given the equal rights to be promoted and adjudicated in original actions before this Court, a failure to apply the doctrine of laches in interstate compact cases would work an injustice to those who appear before it. The Court's exercise of its original jurisdiction is "basically equitable in nature." *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973). When "the question of the extent and the limitations of the rights of ... two States becomes a matter of justiciable dispute between them, ... this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them." *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907). But disregarding a crucial equitable doctrine guarantees that the "public rights" of one state will be deemed more important in some cases than the public rights of another, and that in such cases justice will not be done.[11]

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[11]The United States has taken the view that the doctrine of laches can be applied in interstate compact cases. *See* Brief for United States at 35-36, *Kansas v. Colorado*, 514 U.S. 673 (1995) (No. 105, Original).

The Special Master concluded that "application of the laches doctrine is not necessary to a just resolution of this case," expressing his "satisf[action] that New York's concerns can be addressed through an analysis of prescription and acquiescence" (R 105). And it is true that this Court has made a suggestion to the same effect. *See Illinois v. Kentucky*, 500 U.S. 380, 388 (1991). But an examination of the two doctrines reveals that they vindicate different equitable principles and depend upon different criteria.

Thus, prescription and acquiescence in a case of this sort seeks to give effect to the practical interpretation given to a compact by the sovereigns that agreed upon it. It requires both "'possession of territory under a claim of right'" by the prescribing state, *id.*, and "'long acquiescence'" in that possession, *id.* (cit om), betokening the acquiescing state's belief that the other state had a right to be where it was. At issue with prescription and acquiescence is "the practical construction given to the boundary by the two states." *Vermont v. New Hampshire*, 289 U.S. 593, 614 (1933). Consequently, when this Court seeks to ascertain whether there was acquiescence by one state in another's exercise of dominion over territory now in dispute, it examines not just whether there has been formal litigation between the states over the territory but also the conduct of the states and their citizens.

The defense of laches involves different concerns. It goes to the need for repose in the disposition of territory and to the unfairness, regardless of the merits of the claim of the party against whom the defense is asserted, of disturbing long-settled arrangements, "especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance." *Hays v. Port of Seattle*, 251 U.S. 233, 239 (1920). Whereas prescription and acquiescence requires that the complaining state actually have been quiescent, so as to assure the other state that its claim of right is accepted, laches is fully compatible with loud saber-rattling by a plaintiff who nonetheless does not follow through with timely litigation.

When a delay in litigation causes prejudice to the defendant, that delay is *in itself* so inequitable as to deprive the plaintiff of any claim. It is for this reason that laches looks exclusively to whether the complaining party has filed suit in timely fashion. As this Court has put it, because "[s]ome degree of diligence in bringing suit is required under all systems of jurisprudence," the question in a laches case is "whether the suit was brought

without unreasonable delay." *Patterson v. Hewitt*, 195 U.S. 309, 317-318 (1904). A lawsuit and only a lawsuit indicates the seriousness of the plaintiff's claim.

The distinction between laches on the one hand and prescription and acquiescence on the other is preserved in international law. Thus, there is "acquisitive prescription," corresponding to prescription and acquiescence, which entails "the removal of defects in a putative title arising from usurpation of another's sovereignty by the consent and acquiescence of the former sovereign" and is based "on considerations of good faith, the presumed voluntary abandonment of rights by the party losing title, and the need to preserve international stability." Ian Brownlie, *Principles of Public International Law* 154 (4th ed. 1990). On the other hand, there is "extinctive prescription," or laches, in which the "lapse of time . . . create[s] equities in favor of the possessor" by virtue of "the difficulty the defendant has in establishing the facts." *Id.* at 154, 505.

Precisely this distinction was observed in one of this Court's earliest cases involving an interstate agreement. *Rhode Island v. Massachusetts*, 40 U.S. (15 Pet.) 233 (1841), involved an 18th Century boundary agreement between the two states. Massachusetts had long occupied the territory in dispute, and argued (in the Court's words) that "after such a lapse of time, [Rhode Island] is barred by prescription, or must be presumed to have acquiesced in the boundary agreed upon; and that if she did not acquiesce, she has been guilty of such laches and negligence in prosecuting her claim, that she is no longer entitled to the countenance of a court of chancery." 40 U.S. at 272. At a preliminary stage of the original action, the Court declined to hold "that the possession of Massachusetts has been such as to give her a title by prescription [,] or that the laches and negligence of Rhode Island have been such as to forfeit her right to the interposition of a court of equity," but permitted Massachusetts, when the action proceeded, to show *either* Rhode Island's "acquiescence with knowledge" *or* that "Rhode Island was guilty of laches in not prosecuting her rights." *Id.* at 274. As this early holding of the Court suggests, prescription and acquiescence goes to the nature and quality of the dominion over disputed territory exercised by the state claiming prescription. Laches, by contrast, focuses on the delay by the complaining state and the results of that delay.

Thus, the Special Master erred in concluding that prescription and acquiescence renders it unnecessary to address the question of laches. Even

if New York did not obtain Ellis Island by prescription and acquiescence, the fact remains that, however strong may have been New Jersey's belief in its own entitlement to Ellis Island, it never until 1993 filed suit to vindicate that entitlement, even as New York was exercising, both during and after the immigration period,[12] sovereignty over the Island. New Jersey's failure to file suit gives rise to a laches defense. Wisely, the Special Master permitted the introduction of evidence into the record enabling the Court "to address laches should it decide to do so" (R 105). Because there is no reason to decline to apply laches in an interstate compact case, and because the issues raised by laches are not addressed in analyzing New York's exercise of dominion over Ellis Island and New Jersey's acquiescence in that exercise, this Court should view the case in terms of laches.

B. New Jersey is Guilty of Laches in Failing Timely to Commence this Action

If laches applies to this case, it applies to defeat New Jersey's untimely assertion of a claim over Ellis Island. New Jersey's decades-long delay, coupled with the prejudice that delay has caused New York in making its case, means that New Jersey's claim that it is entitled to sovereignty and jurisdiction over any portion of Ellis Island must fail.

As this Court has noted, a defense of laches has two elements. It "'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Kansas v. Colorado*, 514 U.S. at 687 (cit om). There can be no doubt as to New Jersey's lack of diligence. Indeed, the more readily one accepts New Jersey's own account of its role in Ellis Island's history, the more

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[12] With Ellis Island under the authority of the National Park Service (NPS), New York continued to exercise a measure of jurisdiction over the Island. New York provided unemployment insurance for NPS employees at Ellis Island (T 3175), and the NPS distributed to its employees on the Island an information packet including a "City of New York Certificate of Nonresidence" for New York City tax purposes (NY 943; T 3167). Between 1987 and 1991, the NPS applied for and received from New York State permits to build and operate an incinerator on Ellis Island (NY 903-911). New York, unlike New Jersey, collected personal and corporate income taxes and sales and use tax deriving from restoration, construction, and the operation of concessions on Ellis Island (NY 919, 941; T 3231-3240, 3488-3489, 3492-3496).

manifest its lack of diligence seems. According to New Jersey, its Board of Riparian Commissioners contemplated action to vindicate its rights -- by New Jersey's account, rights not only of ownership but of sovereignty -- even before Ellis Island opened as an immigration center (NJ 1). Even after New Jersey conveyed to the United States title to the subaqueous land surrounding the Island, New York continued to exercise such jurisdiction over the Island as remained to be exercised by a state. If, as New Jersey says, its occasional efforts to obtain some benefit from Ellis Island over the next half century amounted to an assertion of sovereignty, then its failure to bring suit to vindicate its position is even more difficult to fathom.

New Jersey may argue that until the INS abandoned Ellis Island, a stake in the disposition of the Island was not worth suing over. But it was at precisely that point that its laches intensified. The INS abandoned Ellis Island in 1954; by New Jersey's account, public discussion of how to dispose of it began almost at once. By 1960, a Senate subcommittee was holding hearings on the possible uses of the Island (NJ 143). In that same year, Salvatore A. Bontempo, Commissioner of the New Jersey Department of Conservation and Economic Development and Chairman of the New Jersey Commission on Interstate Cooperation, took the position that New Jersey had jurisdiction over Ellis Island, referred the matter to the State Attorney General for further consideration, and strongly intimated that the impasse between the states would force him to take the dispute to federal court (NJ 133, 134). No litigation followed. Instead, New Jersey waited yet another thirty-three years to commence this suit. This long and unexplained delay satisfies the requirement that New York demonstrate New Jersey's lack of diligence in asserting its claim.

New Jersey's delay in filing suit greatly prejudiced New York. As this Court has noted, "[t]he law of laches . . . is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society." *Brown v. Buena Vista Co.*, 95 U.S. 157, 161 (1877). In the present case, New Jersey's lack of diligence has affected, first of all, the availability of "the muniments of evidence." Documents that might support New York's claim and illuminate the views of the federal government and of individual citizens on sovereignty over the landfilled portions of Ellis Island are now irretrievably lost.

This is true, for instance, of tax documents. The Special Master complained that "New York failed to present more than a scintilla of evidence of her taxing authority in the relevant prescriptive periods before 1955" (R 130). But states do not retain tax records indefinitely. New Jersey waited to file this suit for nearly forty years after Ellis Island ceased to have any residents or to be the home of a significant work force. Any evidence that New York imposed its income tax on those who lived or worked on Ellis Island during the immigration period has long since vanished.

Nor are these the only unavailable documents that might assist New York's case. The tide of time first washes away the most quotidian records of life; documents involving affairs of state take longer to erode. A portion of New York's case is based on the proof derived from routine documents -- marriage licenses, certificates of birth and death, letterheads, postmarked envelopes, unremarkable business transactions -- that are the first to be swallowed by history under any circumstances. This is especially problematic in the present case because the heyday of Ellis Island as an immigration center ended thirty years before the INS abandoned the Island. The greatest concentration of documents probative of New York's case presumably would date from no later than 1924, when changes in the immigration law diminished Ellis Island's role in American life. New Jersey's delay in filing suit assures that these documents are gone.

Moreover, the particular circumstances of Ellis Island increase the likelihood that records helpful to New York's case have vanished. In 1954, when the INS abandoned Ellis Island, "the people just left" (T 1959). From 1954 until 1965, Ellis Island was overseen by the General Services Administration (GSA). In 1965, when the Island became the responsibility of the NPS, GSA cut off the heat and other utilities at the Island, and kept only a single guard there, who patrolled only during daylight hours (NJ 162 p 187). Because Congress did not actually appropriate the funds it had authorized for Ellis Island in 1965, the NPS was deprived of the money necessary to maintain guards and police dogs on the Island (NY 74 p 1170).

The results were predictable. Harbor pirates came ashore and "carr[ied] off chairs, desks, metal piling and anything else that was portable" (NJ 162 p 187). "Leaky roofs went unrepaired....On the lower floors water accumulated in places to a depth of several inches....Pilferage and vandalism continued" (NJ 162 p 187). By 1966 "the place was rapidly becoming a group of ruins" (NJ 162 p 187). Not until 1976, when Congress

appropriated funds for Ellis Island, could the NPS afford to post a 24-hour guard on the Island (NY 74 pp 1190-1191). And even thereafter, loss and decay continued. An inspection tour of the Island by NPS personnel in 1978 revealed "a whole variety of...historical documents from the immigration period" not only in boxes and file cabinets but also "spilled on the floor" and otherwise "all over the place," with some "in better shape than others" (T 1957, 2478).

It is in the loss of such documents, neglected and presumably stolen, misplaced or damaged over a period of nearly a quarter-century, that the prejudice to New York from New Jersey's delay partly resides. In the Special Master's view, New York's prescriptive acts were "isolated," "episodic" or "intermittent" (R 118, 144). While this is itself incorrect, the unanimity of the evidence of prescription suggests that, had New Jersey not delayed its suit and documents not been irretrievably lost, the evidence presented by New York could have been even stronger, bridging the gaps that were, for the Special Master, fatal to New York's case.

To the Special Master, "[b]ecause it is impossible to know from the record whether [New York's] speculation [i.e. "that documents may have been destroyed prior to the time suit was commenced"] is correct," no prejudice to New York's case could be found (R 104-105). But of course, that is precisely the point. Given the nature of the proof of prescriptive acts offered by New York and the likelihood, by virtue of both the workings of time and the long abandonment of Ellis Island, that many useful documents have vanished, New Jersey's delay until 1993 in filing suit has caused substantial prejudice to New York.

Nor is it merely by virtue of missing documentary evidence that New Jersey's laches has harmed New York. Fully as critical a loss to New York is the testimony of living witnesses who were familiar with the operations and circumstances of Ellis Island during the immigration period. Such evidence would have been helpful on at least two matters. First, in the Special Master's view, "because no poll was taken, we will never know for certain in which State most immigrants perceived they were landing" (R 129). What those who actually lived and worked on Ellis Island believed about where they were living and working obviously has bearing on the issue of prescription and acquiescence. *See Maryland v. West Virginia*, 217 U.S. 1, 41 (1910) (how residents "regarded themselves as citizens" is relevant to prescription and acquiescence). Had New Jersey filed suit less than forty

years after Ellis Island was abandoned, New York might have presented testimony on this issue sufficient to satisfy the Special Master.

The bind into which New Jersey's delay has thrust New York is epitomized by the Special Master's dismissive reference to the memories of a fact witness who resided on Ellis Island as a child (R 115 n 44). People who were adults during the heyday of Ellis Island as an immigration station have long since died. What they believed about and did on the Island is forever irrecoverable -- the more so since New York's day-to-day jurisdiction over Ellis Island was so noncontroversial as rarely to have been remarked upon by the Island's residents and workers at the time.

But New Jersey's delay has deprived New York of valuable testimony in a further important way. What is striking about New Jersey's proof of "counter-prescription," such as it is, is its fragility. It depends upon the words and actions of a handful of people: Congresswoman Mary Norton, Commissioner Edward Corsi, the 1890 Harbor Line Board mapmaker, a Hudson County tax assessor, a few federal officials. Had New Jersey filed suit sooner than 1993, it might have been possible to inquire specifically into the motivations of these individuals, their comprehension of the issues underlying jurisdiction over Ellis Island, and the meanings of their acts. Now that is impossible.

As this Court long ago observed, "[n]o human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals." *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 639 (1846) (finding acquiescence by Rhode Island in Massachusetts' prescription). Thus, for example, in *Indiana v. Kentucky*, 136 U.S. 479 (1870), the Court found dispositive Indiana's delay in bringing suit over disputed territory for some seventy years after its admission to statehood:

> On that day [of Indiana's admission], and for many years afterwards...there were, perhaps, scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two states now hinge; and yet she waited for over 70 years before asserting any claim whatever [to the land in question].

Id. at 509 (Indiana acquiesced in Kentucky's prescription).

The same applies here. New Jersey, by its own account, could have sued New York over Ellis Island at some point before 1993. Its delay in asserting its claim to the landfilled portions of Ellis Island deprived New York of valuable additional dispositive documentary evidence and testimony. Accordingly, New Jersey is guilty of laches, and cannot prevail.

CONCLUSION

FOR THE FOREGOING REASONS, THE COURT SHOULD REJECT THE REPORT OF THE SPECIAL MASTER RECOMMENDING THAT THE STATE OF NEW JERSEY BE DECLARED SOVEREIGN OVER THE LANDFILLED PORTIONS OF ELLIS ISLAND, AND ISSUE A DECREE DECLARING THAT THE ENTIRETY OF ELLIS ISLAND IS IN THE TERRITORY AND SUBJECT TO THE SOVEREIGNTY OF THE STATE OF NEW YORK.

Dated: Albany, New York
July 30, 1997

Respectfully submitted,

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APPENDIX

COMPACT OF 1834

Act of June 28, 1834, 4 Stat. 708 (1834)

CHAP. CXXVI.—*An Act giving the consent of Congress to an agreement or compact entered into between the state of New York and the state of New Jersey, respecting the territorial limits and jurisdiction of said states.*

WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:

Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance of an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18, 1833, of the one part; and Theodore Frelinghuysen, James Parker, and Lucius Q.C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Ray, to the main sea; except as hereinafter otherwise particularly mentioned.

ARTICLE SECOND. The State of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, *Provided*, That the navigation be not obstructed or hindered.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over the waters of the sound from the westernmost end of Schooter's Island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan bay lying westward of a line drawn from the lighthouse at Prince's bay to the mouth of Mattavan creek; subject to the following rights of property and of jurisdiction of the state of New York, that is to say:

1. The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New Jersey, which now exist or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and middle of said waters: *Provided,* That the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH. Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offence committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid; or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof; may be served upon any of the said waters within the exclusive jurisdiction of the state of New York, unless such person or property shall be on board a vessel aground upon, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this sixteenth day of September, in the year of our Lord one thousand eight hundred and thirty-three and of the independence of the United States the fifty-eighth.

B.F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR,
THEO. FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q.C. ELMER.

And whereas the said agreement has been confirmed by the legislatures of the said states of New York and New Jersey, respectively,—therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, *Provided,* That nothing therein contained shall be construed to impair or in any manner effect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

APPROVED, June 28, 1834.